

In the Matter of the Compensation of
RACHEL BONINE, Claimant
WCB Case No. 22-00671
ORDER ON REVIEW
Jodie Phillips Polich, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Ousey.

The SAIF Corporation requests review of those portions of Administrative Law Judge (ALJ) Smith's order that: (1) set aside its denial of claimant's occupational disease claim for a mental disorder; and (2) awarded a \$35,000 attorney fee for claimant's counsel's services at the hearing level. On review, the issues are compensability and attorney fees. We adopt and affirm the ALJ's order with the following supplementation.

In setting aside SAIF's denial, the ALJ found that the opinion of Ms. Clemmons, a Licensed Marriage and Family Therapist (LMFT), persuasively established that claimant's mental disorder was caused in major part by her employment conditions. The ALJ awarded claimant's counsel a \$35,000 assessed attorney fee for her services at the hearing level.

On review, SAIF contests the ALJ's evaluation of the medical evidence. If the Board affirms, SAIF argues that the ALJ's \$35,000 attorney fee award was excessive. For the following reasons, we affirm the ALJ's order.

Compensability

To establish the compensability of a mental disorder, claimant must prove that employment conditions were the major contributing cause of the disorder. ORS 656.266(1); ORS 656.802(2)(a). Claimant must establish that there is a diagnosis of a mental or emotional disorder generally recognized in the medical or psychological community, and the employment conditions producing the mental disorder must exist in a real and objective sense. ORS 656.802(3)(a), (c). There must also be clear and convincing evidence that the mental disorder arose out of and in the course of employment. ORS 656.802(2)(d).

Finally, the employment conditions producing the mental disorder must be conditions other than conditions generally inherent in every working situation or reasonable disciplinary, corrective, or job performance evaluation actions, or

cessation of employment or employment decisions attendant upon ordinary business or financial cycles. ORS 656.802(3)(b). The phrase “generally inherent in every working situation” means those conditions that are usually present in all jobs and not merely in the specific occupation involved. *Whitlock v. Klamath County Sch. Dist.*, 158 Or App 464, 471 (1999); *Jessica R. Cilione*, 72 Van Natta 944, 945 (2020).

In the context of a mental disorder claim, factors excluded under ORS 656.802(3)(b) and nonwork-related factors must be weighed against nonexcluded work-related factors. *Liberty v. Shottthafer*, 169 Or App 556 (2000); *Heather D. Whitaker*, 65 Van Natta 1793, 1794 (2013). The claim is compensable only if the nonexcluded work-related causes outweigh all other causes combined. *Id.*

This claim presents a complex medical question that must be resolved by expert medical opinion. *See Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Caitlin A. Stanphill*, 73 Van Natta 856, 856 (2021). When medical experts disagree, we give more weight to opinions that are well reasoned and based on complete information. *Jackson County v. Wehren*, 186 Or App 555, 559 (2003); *Somers v. SAIF*, 77 Or App 259, 263 (1986); *Jayden S. Smytherman*, 74 Van Natta 602, 604 (2022).

Based on our review of the record, we agree with the ALJ’s conclusion that the opinion of Ms. Clemmons was persuasive, because hers was the only opinion that weighed the non-excluded work-related factors against all excluded work-related factors and non-work factors. *See Cilione*, 72 Van Natta at 950 (physician’s compensability decision was persuasive when it weighed includable work-related causes against any excludable work-related and nonwork-related causes). Moreover, Ms. Clemmons sufficiently addressed Dr. Villaneuva’s opinion (that claimant’s mental disorder was resolved and stable in December 2021) by explaining that claimant was actively experiencing symptoms of her mental disorder and treatment continued to be directed at claimant’s workplace trauma and exposures. (Ex. 59-3). *See Lisa M. Howe*, 70 Van Natta 288, 296 (2018) (medical opinion that adequately addressed contrary medical opinions was persuasive); *Joann M. Jones*, 68 Van Natta 1774, 1778-79 (2016) (physician’s opinion was not discounted where it sufficiently addressed contrary opinion).

We also agree with the ALJ’s reasoning and conclusion that Dr. Villaneuva’s opinion was unpersuasive because he did not expressly weigh nonwork-related factors against nonexcluded work-related factors. (Ex. 52-16).

In sum, based on the aforementioned reasoning, as well as the reasoning expressed in the ALJ's order, the record persuasively establishes the compensability of claimant's occupational disease claim for her mental disorder. ORS 656.802(3).

Attorney Fees

As expressed above, the ALJ determined that \$35,000 was a reasonable attorney fee for claimant's counsel's services at the hearing level. In doing so, the ALJ particularly noted the time expended by claimant's counsel prior to the hearing, the length of the hearing, the "steep odds and vigorous defense," and the remote nature of the proceedings.

On review, SAIF contends that the \$35,000 attorney fee awarded for claimant's counsel's services at the hearing level is excessive. Based on the following reasoning, we affirm the ALJ's attorney fee award.

In determining a reasonable attorney fee award, we apply the factors set forth in OAR 438-015-0010(4) to the circumstances in each case.¹ *See Schoch v. Leupold & Stevens*, 325 Or 112, 118-19 (1997); *Karista D. Peabody*, 73 Van Natta 244, 248 (2021). Those factors are: (1) the time devoted to the case; (2) the complexity of the issue(s) involved; (3) the value of the interest involved; (4) the skill of the attorneys; (5) the nature of the proceedings; (6) the benefit secured for the represented party; (7) the necessity of allowing the broadest access to attorneys by injured workers; (8) the fees earned by attorneys representing the insurer/self-insured employer, as compiled in the Director's annual report under ORS 656.288(7) of attorney salaries and other costs of legal services incurred by insurers/self-insured employers pursuant to ORS Chapter 656; (9) the risk in a particular case that an attorney's efforts may go uncompensated; (10) the contingent nature of the practice of workers' compensation law; (11) the assertion of frivolous issues or defenses; and (12) claimant's counsel's contingent hourly rate, if asserted, together with any information used to establish the basis on which the rate was calculated.

Here, while we find the ALJ's award of \$35,000 for claimant's counsel's services at the hearing level to be on the high end for services performed at the hearing level, we find it reasonable under the circumstances of this particular case.

¹ We are not required to make findings for each rule-based factor. *See Weyerhaeuser Co. v. Fillmore*, 98 Or App 567, 571 (1989) (the Board is not required to make findings as to each rule-based factor regarding a reasonable attorney fee award, but the Board's explanation must be detailed enough to establish a reasonable basis for its decisions); *Christopher Taylor*, 73 Van Natta 439 (2021) (same).

See Chauntelle A. Olson, 73 Van Natta 583 (2021); *Paul F. Johnson*, 73 VN 1070 (2021); *Cilione*, 72 Van Natta at 944; *Jeremy J. Veelle*, 72 Van Natta 894 (2020); *James D. Hibbs*, 72 Van Natta 819 (2020); *Grant Smith*, 72 Van Natta 543 (2020).²

Claimant's counsel reported 42 hours spent on the case at the hearing level. A detailed fee submission describing the tasks completed and the hours required for such tasks was not provided. The record in this case was not particularly extensive, involving 59 exhibits (one of which was submitted by claimant's counsel). (Ex. 59). That exhibit included a concurrence letter from Ms. Clemmons and a four page attachment of diagnostic criteria for posttraumatic stress disorder. (Ex. 59-7-10). Claimant's counsel prepared for and participated in the telephone conference for Ms. Clemmons's concurrence. (Ex. 59). Reflecting her skill in litigating these types of cases, she asked detailed and well-prepared questions regarding claimant's symptoms, work history, and appropriate diagnosis. (*Id.*) The result of such work product was a medical opinion on which the ALJ and the Board relied to find the claim compensable.

The hearing lasted two hours, which we find to be an average hearing length. Claimant and the Business Services Director for Lake County testified. (Tr. 5-29). Claimant's counsel conducted a detailed examination of claimant regarding her working conditions and her symptoms. (Tr. 6-19). Claimant's counsel also gave a thorough and lengthy closing argument, explaining how claimant met her burden of proving under ORS 656.802 that her employment conditions were the major contributing cause of her mental condition. (Tr. 30-39). Under such circumstances, we find that claimant's counsel reasonably spent extensive time preparing for and conducting the hearing testimony and closing argument.

Turning to the complexity of the case, as noted above, this case involved an occupational disease claim for a mental disorder. Such claims involve significant factual and legal complexity and tend to result in higher attorney fee awards. *See Johnson*, 73 Van Natta at 1073-74. Here, the factual complexity of the case was heightened because there were multiple experts disputing the compensability of claimant's mental disorder claim.

² These decisions issued after recent amendments to the Board's attorney fee rules, which modified the OAR 438-015-0010(4) factors to include consideration of the necessity of allowing the broadest access to attorneys by injured workers and the fees earned by attorneys representing the insured/self-insured employer, as compiled in the Director's annual report. The amendments also provided that the risk of going uncompensated and contingent nature of the practice factors would be considered separately. *See* WCB Admin. Order 1-2020, eff. June 1, 2020, Order of Adoption. Because the attorney fee awards in these decisions considered the amended factors, we consider them instructive to the determination of a reasonable fee award in this case.

Moreover, compensability disputes involving mental disorder claims commonly involve detailed and fact-specific arguments regarding whether certain work activities contributing to the claimant's condition are generally inherent in the workplace. *See* ORS 656.802(3)(b) (requiring that employment conditions contributing to a mental disorder be conditions other than those generally inherent in every work situation or reasonable disciplinary, corrective, or job performance evaluation actions, or cessation of employment or employment decisions attendant upon ordinary business or financial cycles). Such cases also require multiple factors contributing to claimant's condition to be categorized and weighed by a medical expert in order to meet claimant's burden of proof. *See Shothafer*, 169 Or App at 565-66.

Turning to the value of the interest involved and the benefit secured for claimant, claimant's mental disorder claim will now be an accepted claim, which will provide an array of benefits.

Claimant's counsel is highly skilled, with 30 years of experience practicing workers' compensation law and extensive experience litigating claims involving mental disorder conditions. SAIF's hearing counsel is also highly skilled with extensive experience practicing workers' compensation law.

Finally, the risk of going uncompensated in this particular case was high. In so concluding, we again highlight the complexity of the factual and legal issues and note that occupational disease claims involving mental disorder conditions are subject to a "clear and convincing" evidentiary standard and the "major contributing cause" standard of proof. *See* ORS 656.802(2)(d).

Under such circumstances, considering attorney fee awards in similar cases, and applying the factors set forth in OAR 438-015-0010(4) to the particular circumstances of this case, we affirm as reasonable the ALJ's \$35,000 attorney fee award.

Claimant's counsel is entitled to an assessed fee for services on review regarding the compensability and attorney fee issues. ORS 656.382(2), (3). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's counsel's services on review is \$5,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issues (as represented by claimant's respondent's brief and her counsel's uncontested fee submission), the complexity of the issues, the value of the interests involved, the risk that claimant's counsel might go uncompensated, and the contingent nature of the practice of workers' compensation law.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated June 2, 2022, is affirmed. For services on review, claimant's counsel is awarded a \$5,500 attorney fee, payable by SAIF. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF.

Entered at Salem, Oregon on March 3, 2023